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## JUDICIAL CHORUS AGAINST “ATTRACTIVE ADVERTISING” SUITS GROWS LOUDER WITH RULING

by  
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The British use the expression “at sixes and sevens” to mean a state of confusion or uncertainty. But there can be no confusion or uncertainty engendered by Judge Marianne O. Battani’s recent opinion in *Alston v. Advanced Brands & Importing Co., et al.*, 2006 U.S. Dist. Lexis 31324 (E.D. Mich. May 19, 2006). *Alston* is the sixth class action<sup>1</sup> – or, counting an individual claim,<sup>2</sup> the seventh opinion – to dismiss an attractive advertising claim against alcohol beverage advertisers. The import of these six or seven opinions is crystal clear: attractive advertising claims have no legal merit. Indeed, the whole point of advertising is to be “attractive” and portray the product in a positive light. When that is done without statements that are objectively false or misleading, the mere fact that an advertisement is appealing should not be the basis for a cause of action.

In *Alston*, the mother of underage drinkers sought to recover from nearly 50 alcohol advertisers the money that underage adults and adolescents spent illegally buying alcohol from retailers. The suit’s premise was that youth are “overexposed” to attractive alcohol beverage advertising, and that this causes them to drink illegally. Plaintiff claimed that, as a result, a class of parents was entitled to billions of dollars allegedly spent on underage drinking since 1982.

In her decision, Judge Battani fundamentally rejected the idea that underage adults and adolescents are somehow victims of advertising that merely portrays a product in a positive light. She reasoned that “[t]o assert that minors, because of their age, cannot understand that alcohol does not, in fact, make everyone more attractive, transport them to a tropical paradise, or other

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<sup>1</sup>See also *Goodwin v. Anheuser-Busch Cos., Inc.*, 2005 SL 280330 (Cal. Super. – Los Angeles, Jan. 28, 2005); *Randy Kreft, et al. v. Zima Beverage Co., et al.*, Case No. 04CV1827, *slip op.* (Colo. Dist. Ct. – Jefferson Cty., Sept. 16, 2005); *Eisenberg v. Anheuser-Busch, Inc.*, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006); *Jacquelyn L. Tomberlin v. Adolph Coors Co., et al.*, Case No. 05-CV-545, *slip op.* (Wisc. Cir. Ct. – Dane Cty. Feb. 16, 2006); *Hakki v. Zima Co.*, 2006 WL 852126 (D.C. Super. Mar. 28, 2006).

<sup>2</sup>*Guglielmi v. Anheuser-Busch Cos.*, No. CV-04-594-ST, 2005 WL 300064 (D. Or. Feb. 8, 2005) (recommendation of magistrate judge), *adopted by* No. CV-04-594ST, 2005 WL 524721 (D. Or. Mar. 4, 2005)

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similar scenarios that are common themes in alcohol ads is ridiculous at best.” *Id.* at 21. She further explained that “there is no presumption that minors are incompetent to watch advertising, handle the messages included therein, or that they are incompetent to understand that underage drinking is illegal.” *Id.*

Judge Battani also made it plain that *attractive* advertising is not *false* advertising, and thus is not actionable as a matter of law:

Plaintiff acknowledges that the same ads would be considered puffery if aimed at adults. Plaintiff has not pleaded any factual allegations about specific ads by specific Defendants that contain false or misleading information . . . or how the ads intentionally induce minors to drink. Plaintiff merely includes conclusory allegations that Defendants’ ads induce minors to drink because they make drinking seem appealing. Ads that show beautiful men and women engaging in unrestricted merriment, or fantasies coming true is [*sic*] merely puffery, and is [*sic*] not actionable as fraud.

*Id.* at 22-23.

Importantly, Judge Battani recognized that “[b]oth the dangers inherent in alcohol consumption and the illegality of underage drinking are well known to the public, including minors.” *Id.* at 24. As a result, the defendants had no duty under Michigan’s Consumer Protection Act or the common law “to disclose either inherent dangers of consuming alcoholic beverages, or that alcohol would not make fantasies come to life. Nor did Defendants have a duty to disclose that underage drinking is illegal.” *Id.* at 18-19.

Judge Battani also took the plaintiff to task for not pleading any facts establishing that any defendant actually caused her any injury. The court observed that the “complaint is utterly devoid of a factual basis” and did not link any defendant’s ad or product to plaintiff or any of her children. *Id.* at 9-10. Rather, the complaint “is nothing more than a diatribe against the advertising practices of the alcohol industry as a whole,” she said, and it “merely contains legal conclusions, opinions, and deductions couched as factual allegations.” *Id.* at 10. As a result, “the Complaint does not put each of the over one hundred Defendants on notice of the factual basis of [plaintiff’s] injury.” *Id.* at 9.

Viewed in context with the other six opinions, *Alston* is yet another strong judicial pronouncement that people – even underage people – are responsible for their own decisions to ignore common knowledge and abuse or misuse products, and they cannot shift responsibility for such choices onto truthful and non-deceptive advertising, no matter how appealing that advertising may be.